BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LISA K. VOLPERT	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,042,658
EAGLE SUPPORT SERVICES CORPORATION	)	& 1,047,841
Respondent	)	
AND	)	
	)	
UNITED STATES FIRE INSURANCE COMPANY	)	
and NEW HAMPSHIRE INSURANCE COMPANY	)	
Insurance Carriers	)	

ORDER

Respondent and its insurance carrier New Hampshire Insurance Company appeal the January 29, 2010, Preliminary Hearing Order[1] of Administrative Law Judge Rebecca Sanders (ALJ). Claimant was awarded benefits in the form of ongoing medical treatment with Daniel T. Hinkin, M.D., as the authorized treating physician for the injuries suffered to claimant's right knee on July 16, 2009. The ALJ determined that claimant suffered an accidental injury on July 16, 2009, which arose out of and in the course of her employment with respondent.

Claimant appeared by her attorney, Matthew R. Bergmann of Topeka, Kansas. Respondent and its insurance carrier United States Fire Insurance Company (a.k.a. Crum & Forster Insurance Company) appeared by their attorney, David P. Mosh/Jessica R. Beever of Kansas City, Missouri. Respondent and its insurance carrier New Hampshire Insurance Company appeared by their attorney, Christopher J. McCurdy of Overland Park, Kansas. This dispute not only arises between claimant and respondent, but also between respondent's two insurance carriers. When discussing the arguments of respondent and

[1] Claimant and respondent argue two possible accidents in this matter. Claimant alleges a new right knee injury on July 16, 2009, when she stood up from a toilet seat. This is in Docket No. 1,047,841. The allegation has also been raised that claimant's right knee problems are the natural consequence of her original knee injury on April 24, 2007, which was assigned Docket No. 1,042,658. The Preliminary Hearing Order of the ALJ determined not only the issues raised at the preliminary hearing, but also the post-award dispute with claimant's left knee and whether the injury to the right knee was a natural consequence of that earlier claim.

its insurance carrier United States Fire Insurance Company, a.k.a. Crum & Forster Insurance Company, the Appeals Board (Board) will identify them collectively as "Crum". When discussing the arguments of respondent and New Hampshire Insurance Company, the Board will identify them collectively as "New Hampshire". At the time of claimant's left knee injuries in 2007 in Docket No. 1,042,658, respondent was insured by Crum. At some time not specifically identified, respondent switched to insurance carrier New Hampshire. The exact date is not in this record, but the coverage switch occurred prior to claimant's accident on July 16, 2009, in Docket No. 1,047,841.

The Board adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Settlement Hearing, in Docket No. 1,042,658, held November 25, 2008, with attachments; the transcript of Preliminary Hearing held January 27, 2010, listing both docket numbers, with attachments; and the documents filed of record in this matter.

ISSUES

1. Did claimant suffer an accidental injury which arose out of and in the course of her employment with respondent on the date alleged? Both Crum and New Hampshire agree that claimant's accident on July 16, 2009, occurred while claimant was in the course of her employment with respondent. However, both argue that claimant's injuries on July 16, 2009, did not arise out of her employment with respondent. They contend that claimant's accident occurred as the result of a normal activity of daily living and is, therefore, not compensable. Claimant argues either the right knee injury is a natural consequence of the earlier work-related injury to her left knee or a new and separate work-related injury to the right knee.

2. Was claimant's accident on July 16, 2009, a natural consequence of the accident and resulting injuries suffered to claimant's left knee on April 24, 2007? Both claimant and New Hampshire argue in the alternative that claimant's accident, if not a new accident, was a natural consequence of claimant's left knee injury.

FINDINGS OF FACT

After reviewing the record compiled to date, the Board concludes the Preliminary Hearing Order should be modified.

Claimant was working in a clerical position for respondent on July 16, 2009, when she had to use the restroom. Claimant had suffered an earlier work-related injury to her left knee[2] and, as a result, was wearing a brace on the left leg which severely restricted claimant's ability to bend the knee. Thus, when sitting or standing in the

[2] This earlier accident occurred on April 24, 2007.

restroom, claimant was forced to use her right leg almost entirely. On July 16, 2009, while rising from the toilet, claimant's right knee popped and she experienced immediate pain. The pain improved after a short period of time and claimant was able to rise off the toilet. Claimant advised her supervisor of the incident but did not seek medical treatment. On July 23, 2009, claimant was again using the restroom. Again, as she was rising from the toilet, her right knee popped. This time, the knee did not improve. Claimant again advised her supervisor. Claimant was referred to Dr. Hinkin for an evaluation and treatment. Claimant was provided with physical therapy and an MRI was recommended. After the recommendation for the MRI, claimant's accident was denied and the matter proceeded to litigation.

Claimant's left knee history is significant. She underwent an ACL reconstruction in 1985 and was returned to work without restrictions. It is unclear if this injury and resulting treatment were associated with her employment with respondent. Claimant has since undergone four additional surgeries to her left knee. The last two surgeries, in 2008 and on June 8, 2009, were for an injury suffered while working for respondent. That injury claim was for an injury on April 24, 2007, and was assigned Docket No. 1,042,658. This matter was settled via a friendly settlement hearing on November 25, 2008. The running award settled claimant's claim, but left both claimant's right to seek future medical treatment and review and modification of the settlement open for future determination.

After the June 8, 2009, surgery, claimant continued to have problems with her left knee. This injury required that claimant be placed in an office job, rather than in the field, where claimant was working before the left knee problems arose. Claimant was wearing a brace on her left leg which severely restricted her ability to bend the knee. It also required that when claimant use the restroom, her entire weight would be placed on her right leg, both when sitting and when standing. Claimant acknowledged that the floor in the bathroom was not wet and she did not slip when standing. It was merely the act of standing that caused the injury to her right knee.

Claimant was referred to orthopedic surgeon Daniel T. Hinkin, M.D., for treatment of the right knee on August 10, 2009. Claimant was already being treated by Dr. Hinkin for her left knee injury at that time. At the preliminary hearing, claimant was questioned regarding a July 15, 2009, report from Dr. Hinkin that stated the brace on the left leg was to be discontinued as of July 20, 2009. For reasons unknown, claimant continued to wear the brace on July 23, 2009. Dr. Hinkin diagnosed claimant with a medial retinacular sprain, fat pad impingement or medial meniscus tear in the right knee. Claimant was returned to work with restrictions against running, jumping, squatting, kneeling or working at heights. A followup examination on October 22, 2009, resulted in a diagnosis of a possible medial meniscus tear with a recommendation for an MRI. The restrictions, which respondent followed, remained the same. The request for the MRI was denied, forcing this matter to litigation. In a November 30, 2009, letter to respondent New Hampshire's attorney, Dr. Hinkin opined that claimant's right knee injury is a separate and distinct injury

from her left knee injury. He stated that there was no indication that the right knee problem developed due to the left knee problem.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[5]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[6]

> An injury shall not be deemed to have been directly caused by the employment where the injury results from normal activities of day-to-day living.[7]

> When a workers compensation statute is plan and unambiguous, the courts must give effect to it express language rather than determine what the law shoulder

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[3] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 2006 Supp. 44-501(a).

[6] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[7] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 2, 147 P. 3d 1091, *rev. denied* 281 Kan. ___ (2006).

> or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.[8]

Respondent contends claimant's right knee injury was the result of an activity of day-to-day living, namely using the toilet. In a normal situation, respondent's argument might have merit. However, here, there exists elements not contained in the normal day-to-day living situation. In *Johnson*, the claimant was injured when standing up at her desk. The Court ruled that the simple act of standing at one's desk is a normal activity of daily living and not compensable. The *Johnson* Court did, somewhat, misquote K.S.A. 44-508(e). In the statute, the injury is not compensable where the "disability" is the result of the natural aging process or by the normal activities of day-to-day living. In *Johnson*, the Court stated that it is where the "injury" results from the normal activities of day-to-day living. Injury and disability are not synonymous. Injury is defined as a lesion or change in the physical structure of the body. Disability is a more complicated definition and encompasses both physical damage and financial or employment damage from an accident and how that damage affects an individual's ability to perform both work tasks and life tasks.

In workers' compensation litigation, when a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[9]

Here, the "normal" act of standing has been compromised due to claimant's prior left knee injury. While standing up from a toilet is a normal activity of daily living, attempting to stand while bearing the added burden of a brace on one's left leg is not. Claimant was forced to use, almost exclusively, her right leg to sit and stand. This extra burden was created purely from the work-related injury to her left leg. The Board finds that claimant's injury to her right leg occurred as the direct result of the burden placed on her right leg by the injury to her left leg. Therefore, the Preliminary Hearing Order of the ALJ is modified to find that while claimant suffered a work-related accident, it relates to the earlier injury to the left leg and is not a new and distinct injury. The award of preliminary benefits is granted against respondent and its insurance carrier Crum. The Order of the ALJ is modified accordingly.

CONCLUSIONS

Claimant suffered an accidental injury which arose out of and in the course of her employment with respondent. The injury to her right knee on July 16, 2009, was the

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[8] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, Syl. ¶ 1, 214 P.3d 676 (2009).

[9] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

natural consequence of the injury suffered to claimant's left knee on April 24, 2007. As such, the Order of the ALJ is modified to award benefits against respondent and its insurance carrier Crum.

DECISION

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge Rebecca Sanders dated January 29, 2010, should be, and is hereby, modified to award ongoing medical treatment for the right lower extremity against respondent and its insurance carrier United States Fire Insurance Company, a.k.a. Crum & Forster Insurance Company. As such, this Order is pursuant to a post-award request for medical treatment in Docket No. 1,042,658, rather than a preliminary hearing order in Docket No. 1,047,841.

IT IS SO ORDERED.

Dated this ____ day of May, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Matthew R. Bergmann, Attorney for Claimant
David P. Mosh/Jessica R. Beever, Attorney for Respondent and its Insurance Carrier United States Fire Insurance Company (Crum & Forster Insurance Company)
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier New Hampshire Insurance Company
Rebecca Sanders, Administrative Law Judge